We further know that the solicitor was allowed three items of 3s. each which covered attending before himself as registrar to obtain the issue of three subpoenas. This weighty matter was solemnly argued and Phillimore J. dealt with it as follows —

"This latter class of charge seems to be a fixed fee representing payment for possibly some exercise of judgment as to the summoning of witnesses, at any rate for the actual drawing of the document and the attendance upon the registrar to procure its issue: the only fraction which could be objected to is this attendance."

Here then is some alternative support for my decision as to attendances in Chambers. But what we do not know, and it is really all that matters, is whether the solicitor put in an item for attendance in Court at the trial. The case is chiefly remarkable for the fact that four counsel engaged the time of five Judges over a matter of less than £20. My conclusion is that the Chief Registrar erred in disallowing in principle items 8, 9, 10 and 11 of this bill of costs. Some question as to quantum could perhaps be raised as to item 10, but the appeal was of some length and difficulty and I think the appellant is entitled to his charge of $200. The appeal is allowed and the sum allowed by way of costs on taxation shall include items 8, 9, 10 and 11 in full.

Costs of the appeal to appellant. Assessed at $40.

Appeal allowed.

RE POH THYE CO. LTD.

[O.C.J. (Thomson C.J.) April 30, 1962]

[K.L. — Companies (Winding-up) No. 17 of 1962]

Company—Compulsory winding-up—Company incorporated under Companies Ordinance 1940-46 carrying on business as sole agents for life insurance company—Whether carrying on "life assurance business"—Life Assurance Companies (Compulsory Liquidation) Act, 1962, ss.2(1) and 8 — Life Assurance Companies Ordinance, 1948 s.2—"Issue"—Meaning of.

On a petition for winding-up under the Life Assurance Companies (Compulsory Liquidation) Act 1962 the case for the petitioner was that the company was one that at the beginning of October 1961 was carrying on life assurance business and that it had failed to comply with a notice served on it under section 2(1) of the Act. The company contended that it was not so carrying on life assurance business and that consequently it was not competent to serve a notice on it and it was not required to comply with any such notice.

Held: (1) on the evidence the activities of the company did not come within the definition of "life assurance business" contained in section 2 of the Life Assurance Companies Ordinance, 1948 (which definition was incorporated into the 1962 Act by section 8 of the said Act);

(2) the expression "issue" in section 2 of the Ordinance must be read as implying the completion of a contract and accepting contractual liability.

Cases referred to:

(1) *Forsikringsaktieselskabet National (of Copenhagen)* v. *Attorney-General* [1925] A.C. 639, 642.

(2) *Levy* v. *Abercorris Slate & Slab Co.* (1888) 37 Ch. D. 260.

(3) *In re Perth Electric Tramways Ltd.* [1906] 2 Ch. 216.

PETITION FOR WINDING-UP.

R. H. V. Rintoul for the petitioner.

N. H. Chan for the Company.

Cur. Adv. Vult.

Thomson C.J.: This is a petition for the winding-up of a limited liability company called the Poh Thye Company Limited by virtue and under the provisions of the Life Assurance Companies (Compulsory Liquidation) Act, 1962.

The case for the petitioner is that the Company is one that at the beginning of October, 1961, was carrying on life assurance business and that it has failed to comply with a notice served on it under section 2(1) of the Act. It is the case for the Company that it was not carrying on life assurance business at the beginning of October, 1961, and that consequently it was not competent to serve a notice on it under the Act and it was not required to comply with any such notice.

If the contention of the Company that it was not carrying on life assurance business at the beginning of October, 1961, is correct, then I think it is common ground that the petition must be dismissed as the 1962 Act only applies to Companies who carry on life assurance business.

By section 8 of the Act expressions used in it which are not defined in it have the same meaning as in the Life Assurance Companies Ordinance, 1948, and by section 2 of that Ordinance "life assurance business" means "the issue of or the undertaking of liability under policies of assurance upon human life, or the granting of annuities upon human life".

The Poh Thye Company was incorporated under the Companies Ordinance in August, 1958. The Memorandum and Articles of Association are not before me, but according to the petition its objects are as follows:—

"To carry on the business of money lending and for these purposes to lend money and negotiate loans, to draw, accept, indorse and discount bills of exchange, promissory notes or other securities.

To carry on the business of Commission Agents, Shipping and Insurance Agents and all kinds of agencies or business which an ordinary individual may legally undertake."

Here it is safe to assume that if there was anything else in the objects of the Company which

is relevant to the present proceedings, or, at any rate, which if relevant would assist the petitioner in any way it would have been brought to my notice.

The nominal capital of the Company is $250,000 divided into 250 shares of $1,000 each and the amount paid up or credited as paid up is $125,000. There is no evidence, nor is it relevant, as to who were the original shareholders. Now, however, and this would appear to have been the case at all material times: the whole share capital is owned by the Directors of the Kinta Insurance Company Limited which carries on the business of a life insurance company and has made the statutory Treasury deposit under the 1948 Ordinance.

Originally the Poh Thye Company would seem to have done a certain amount of money-lending business connected with the making of hire purchase arrangements in relation to motor-cars and would appear to have acted as agents for a company known as the New Zealand Assurance Company which transacts motor accident insurance business. Latterly, however, it has been engaged almost exclusively in dealing with the affairs of the Kinta Insurance Company and has been remunerated for its services by a fixed monthly payment.

As far as can be seen from the affidavits and the cross-examination on his affidavit of a Mr. Foo, who is the Managing Director of the Poh Thye Company and also the Managing Director of the Kinta Company, the position would appear to be that the Kinta Company has been carrying on life assurance business which is probably of the type which the 1962 Act is intended to prohibit, that is to say, the issue of life assurance policies (in practice of modest amount) at rates of premium, generally payable monthly, which are either not graduated according to the age of the life assured or if they are graduated according to the age of the life assured are so graduated by intervals of more than four years.

Since the acquisition of its shares by the Directors of the Kinta Company the Poh Thye Company has acted as agent for the Kinta Company in connection with this sort of business. They collected premiums on behalf of the Kinta Company. They touted for business on behalf of the Kinta Company, but had to obtain the approval of the Kinta Company before issuing policies on its behalf. When a policy holder died they paid out any money due to the beneficiaries after obtaining the approval of the Kinta Company by cheques drawn by the Kinta Company in favour of the beneficiaries. For all this they were paid not on any sort of commission basis but a fixed amount of $4,500 a month which was irrespective of the amount of business done.

For myself I see no reason why I should not accept this account of the activities of the Poh Thye Company during, at any rate, the last year or two. It is supported by the Company's Statements of Accounts which seem to have been compiled by an accountant and which have not been attacked. The Profit and Loss Account is on the face of it that of an agency business and in particular shows no receipts in respect of premiums or expenditure on payment of benefits. The Balance Sheet shows modest assets and no liabilities except in respect of issued share capital.

I have also examined certain documents used by the Company in carrying on its business — a handbill, an application form and a card on which monthly payments are recorded. These documents are printed in the English language and in Chinese characters. As regards the English language they all bear the title of "Poh Thye Company Limited" in large letters, but that title is immediately followed in only slightly smaller and certainly very legible print by the words "Sole agents for Kinta Insurance Company Limited". I am advised that as regards Chinese characters the position is the same.

On all this I am not prepared to say that the business carried on by the Poh Thye Company comes within the definition of "life assurance business" contained in the 1948 Ordinance. There is no question of the Company becoming liable as a principal on any contract of assurance. Apart from the evidence that is so if only for the simple reason that such a contract would be *ultra vires* its powers and *ipso facto* void.

Nor, I think, can it be said that it issues policies of assurance as contemplated by the definition in the Ordinance. It was said by Viscount Cave L.C., in the case of *Forsikringsaktieselskabet National (of Copenhagen)* v. *Attorney-General* [1] in relation to similar wording in the United Kingdom Assurance Companies Act, 1909:—

> ".....there is no magic in the word 'policy'. In substance the expression seems to cover a contract of insurance....."

Here it seems clear that the expression "issue" in the Ordinance must be read as implying the completion of a contract and accepting contractual liability. If the expression were to be read in the sense contended for by the petitioner, that is to say as including the bare physical handing over of documents of contract, it would embrace within its scope the activities of every clerk or agent who was concerned in such physical delivery which is clearly repugnant to the whole

scheme of the statute. In this connection I do not think the debenture cases which have been mentioned are in point (*Levy* v. *Abercorris Slate and Slab Co.*[2] and *In re Perth Electric Tramways Ltd.*[3]). These cases were concerned with the question of when a debenture is issued as affecting questions of liability on the debenture.

The petition is dismissed with costs.

Petition dismissed.

Solicitors:—*Shearn, Delamore & Co.*; *Cheang Lee & Ong.*

TONG AIK (FAR EAST) LTD. v. EASTERN MINERALS & TRADING (1959) LTD.

[O.C.J. (Winslow J.) July 12, 1963]

[Singapore — Suit No. 40 of 1962]

Contract—Lump sum or divisible—Partial performance—Fault of both parties—Whether claim in quantum meruit lies.

The plaintiffs claim a sum of $65,268.54 being the balance due to them from the defendants as their agreed remuneration under a contract for work and labour carried out and materials supplied at the defendants manganese mine at Gual Periok, Kelantan. The contract *inter alia* stipulated that the plaintiffs should be able to supply the defendants with a minimum of 5,000 tons per month. The defendants deny liability on the ground that this is a lump sum contract and that the plaintiffs were in breach of the contract as they did not supply the defendants with the manganese ore as stipulated in the contract. The defendants then claimed to set-off various sums said to be due to them and counterclaimed for $800,000 being loss of profits and penalties incurred by them as a result of the plaintiffs' breach.

Held: (1) this was a divisible contract and that the plaintiffs must be paid for the tonnages of ore actually produced and/or transported to the stockpile;

(2) even if the contract was not divisible in the circumstances of this case the contract carried with it a right on the part of the plaintiffs to payment upon a *quantum meruit* for the services actually rendered.

Cases referred to:—

(1) *Sumpter* v. *Hedges* [1898] 1 Q.B. 673.

(2) *Roberts* v. *Bury Improvement Commissioners* (1870) L.R. 5 C.P. 320.

(3) *Morris* v. *Baron* [1918] A.C. 1.

CIVIL SUIT.

K. E. Hilborne for the plaintiffs.

R. C. Hoffman for the defendants.

Cur. Adv. Vult.

Winslow J.: This litigation arose out of failure to settle by negotiation differences which developed between two old friends, Mr. Tan Boon Swee and Mr. Tay Tuan Siang, in the course of the performance — or should I say, non-performance — of a contract between them contained at pages 2 and 3 of the Agreed Bundle of Correspondence (hereinafter referred to as AB2 and AB3). By novation, the plaintiff (a company subsequently formed by Mr. Tan Boon Swee) agreed to provide the labour to operate the defendants' manganese mine at Gual Periok in Kelantan according to certain specifications and to transport the manganese ore produced therefrom to specified destinations.

The contract stipulated that the plaintiffs should "be able" to supply the defendants with a minimum of 5,000 tons monthly. The plaintiffs were also responsible for providing their own transport such as lorries etc. and the cost of all fuel was to be borne by them. All machinery operating at the mine would be provided by the defendants. The plaintiffs were to be paid $6.50 per ton for operations at the mine and $7.50 per ton for transportation. AB3 reserved the right to the defendants to terminate the contract after six months if the plaintiffs were found to be unsatisfactory.

Before proceeding to discuss the exact nature of this contract and the intentions of the parties as set out in the informal agreement concluded by these letters (AB2 and AB3 of 29th August, 1960, and 1st September, 1960 respectively) and a telephonic acceptance of the conditions set out in AB3 by Mr. Tan Boon Swee, a resume of the facts leading to this agreement may not be out of place.

The defendants had acquired a mining lease of the area concerned about a year previously. This mine had apparently been successfully operated partially by some Japanese before the war. Prospecting and pitting during the year preceding the contract by an experienced though academically unqualified engineer, Mr. Bell, employed by the defendants had given rise to high hopes as to this mine's potential output which were to some extent confirmed by Mr. Fletcher, the senior managing partner of Messrs. Vallentine, Dunne & Associates Ltd., a well-established firm of mining consultants with its Head Office in Kuala Lumpur, who recommended the commencement of small scale mining for one year, in the first instance, aiming at approximately 5,000 tons per month.

On hearing about this mine Mr. Tan approached Mr. Tay and obtained the contract in question, after satisfying himself that it was a commercially workable proposition. Both parties were confident of success after consultations with their respective advisers and were hopeful of rich returns as it was to the advantage of both that the mine should be exploited to its maximum extent. It was therefore against this background of optimism that the contract was concluded and the plaintiffs commenced